

STATE OF MICHIGAN
COURT OF APPEALS

EDWARD S. WIKIERA and JOSEPHINE
WIKIERA,

UNPUBLISHED
September 30, 2003

Plaintiffs-Appellants,

v

BLAZIJA RESETAR a/k/a MICHAEL
RESETAR, and PAMELA RESETAR,

No. 240462
Wayne Circuit Court
LC No. 00-016424-CZ

Defendants-Appellees.

Before: Murphy, P.J., and Cooper and C. L. Levin*, JJ.

PER CURIAM.

Plaintiffs appeal as of right the trial court's order for no cause of action in this breach of contract and trespass action. We affirm.

Plaintiffs argue that the trial court erred in entering a judgment of no cause of action when the evidence at trial established trespass and breach of contract by defendants. We disagree.

Findings of fact by the trial court may not be set aside unless clearly erroneous. MCR 2.613(C); *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002); *People v Lyons (On Remand)*, 203 Mich App 465, 468; 513 NW2d 170 (1994). "The trial court's factual findings are clearly erroneous if, after review of the record, this Court is left with a definite and firm conviction that a mistake has been made." *Lyons, supra* at 468. In applying this principle, this Court defers to the trial court's superior position to observe the credibility of the witnesses who testify during the bench trial. MCR 2.613(C); *Attorney General ex rel Director of Dep't of Natural Resources v ACME Disposal Co*, 189 Mich App 722, 724; 473 NW2d 824 (1991). In contrast, this Court reviews a trial court's conclusions of law de novo. *Walters v Snyder*, 239 Mich App 453, 456; 608 NW2d 97 (2000). Furthermore, where the trial court's factual findings may have been influenced by an incorrect view of the law, an appellate court's review of those findings is not limited to clear error. *Id.*

* Former Supreme Court justice, sitting on the Court of Appeals by assignment.

I. Trial Court's Findings of Fact

In actions tried without a jury, the trial court must find the facts and state separately its conclusions of law as to contested matters. MCR 2.517(A)(1); MCR 6.403; *People v Feldmann*, 181 Mich App 523, 534; 449 NW2d 692 (1989). The rule applies equally to both civil and criminal cases. *Feldman, supra* at 534. The findings and conclusions as to contested matters are sufficient if brief, definite and pertinent, without over-elaboration of detail or particularization of facts. MCR 2.517(A)(2); *People v Lewis*, 168 Mich App 255, 268; 423 NW2d 637 (1988).

In 1996, the City of Dearborn Heights Building & Engineering Director visited defendants' property to inspect an overgrown tree and to review any damage caused by the tree. The tree had grown from plaintiffs' property to the defendants' and pushed and bent a chain-link fence that separated the plaintiffs' and defendants' property. The chain-link fence was 50 years old, had holes in it, was broken in numerous places and found to be beyond repair.

The inspector ordered the removal of the tree. Additionally, Edward Wikiera (plaintiff herein) and Michael Resetar (defendant herein) agreed in the presence of the inspector that the defendants would remove both the tree and the chain-link fence and replace it with a wrought iron fence. They also agreed that no trees or shrubs would be planted within three feet of the fence so that the fence could be maintained. Mr. Wikiera denied that he agreed to replace the existing fence with wrought iron. However, the inspector testified that a chain-link fence would be in violation of existing city ordinances.

While removing shrubbery from his side of the fence in September of 1996, Mr. Resetar hit the chain-link fence with a backhoe moving the fence 10 to 12 inches. The plaintiffs alleged that Mr. Resetar also severed a cable to his perimeter security system. Mr. Resetar indicated to the plaintiffs that he would fix the cable himself, have it fixed by a friend of his (who was licensed), or contact his homeowner's insurance company to repair the cable. The plaintiffs requested that the defendants contact their insurance provider.

Defendants' expert testified that the security system, when properly maintained, has a life expectancy of between five and ten years. The plaintiffs' system was 20 years old, was damaged by lightning 10 years ago, and had no maintenance performed on it during its existence.

Mr. Resetar removed a portion of the damaged cable and took it to a local alarm system company to identify it. He then replaced the cable with a compatible replacement cable. Plaintiffs did not provide defendants' insurance company with an estimate for repair work on the cable, although the insurance company tried to obtain information to process the claim over a three-year period.

The defendants removed the tree in the summer of 1998. They hired a company to remove the chain-link fence one section at a time and replace it with temporary fencing per the plaintiffs' concern regarding a complete enclosure for their dogs. A construction company was also hired to build a masonry wall for the wrought iron fence. The wall was finished in 1998 and installation of the wrought iron fence began in 1999.

However, in the fall of 1999, plaintiffs planted 30 to 50 blue spruce trees within 12 to 18 inches of the fence line. Installation of the fence was not completed until December 28, 2002.

However, defendants removed only 50% of the original chain-link fence. Plaintiffs removed the remainder of the fence and replaced it with a newer chain-link fence in April of 2001.

Additionally, plaintiffs claimed that the construction traffic on defendants' driveway ruined terraces located in the area. Plaintiffs' proof of these terraces was limited to a photograph taken thirty years prior. While defendants denied the existence of terraces in the 1990's, they instructed their contractor to erect terraces on plaintiffs' property. Plaintiffs had the terraces rebuilt at their own expense, as they were not pleased with the aesthetic qualities of the terraces built by defendants' contractor.

After a careful review of the record, we find that the evidence supports the trial court's findings of fact.

II. Judgment of No Cause of Action

Plaintiffs argue that the trial court erred in entering an order of no cause of action with regard to their claim of breach of contract. "In Michigan, the essential elements of a valid contract are: (1) competent parties to contract, (2) proper subject matter, (3) consideration, (4) mutuality of agreement, and (5) mutuality of obligation." *Thomas v Leja*, 187 Mich App 418, 422; 468 NW2d 58 (1991). Negotiations cannot substitute for the formal requirements of a contract nor can a promise to pay be binding without consideration. *Id.*

Plaintiffs first allege that defendants were in breach of contract by replacing the chain-link fence with a wrought iron fence. The agreement was made in the presence of a third party who testified that the parties agreed to replace the chain-link with a wrought iron fence. Additionally, the witness pointed out that the chain-link fence would be in violation of city ordinances. Based on the testimony of the parties, the court found that the agreement was for a wrought iron fence, that the defendants fulfilled their obligation under the agreement and that therefore there was no breach of contract.

Plaintiffs additionally allege that defendants were in breach of contract by failing to rebuild the terraces on their property to their previous conditions. As indicated previously, their evidence was limited to a 30-year old photograph. Defendants' undertaking in this regard was gratuitous, without consideration or mutuality of obligation. Therefore, plaintiffs' displeasure in the appearance of the terraces was not a breach of contract.

Lastly, plaintiffs claim that the defendants' attempt to repair the security cable was also a breach of contract. Although plaintiffs preferred to have the repairs paid for by the defendants' homeowners' insurance, they failed to provide any estimates to the company. The trial court did not err in finding a judgment of no cause of action with regard to plaintiffs' claims of breach of contract.

Plaintiffs also allege that the trial court erred in finding a no cause of action for their trespass claim. "Recovery for trespass to land in Michigan is available only upon proof of an unauthorized direct or immediate intrusion of a physical, tangible object onto land over which the plaintiff has a right of exclusive possession." *Adams v Cleveland-Cliffs Iron Co*, 237 Mich App 51, 67; 602 NW2d 215 (1999). The record is devoid of any evidence of unauthorized entry by the defendants onto plaintiffs' land. Plaintiffs authorized the defendants to enter onto their

land to remove the chain-link fence and construct a temporary fence in its place. The chain-link fence could not be removed without removing the security cable from it.

Accordingly, the trial court did not err in entering an order of no cause of action with respect to plaintiffs.

We decline to order costs pursuant to defendants' claim under MCR 7.216(C)(2).

Affirmed.

/s/ William B. Murphy

/s/ Jessica R. Cooper

/s/ Charles L. Levin